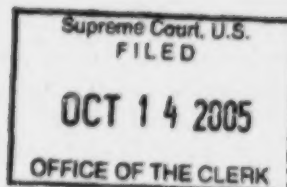


②
No. 05-363



IN THE
SUPREME COURT OF THE UNITED STATES

JACQUES SAINTAUDE, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

*On Writ of Certiorari to the
United States Court of Appeals for the Armed Forces*

**BRIEF FOR THE UNITED STATES NAVY-MARINE
CORPS APPELLATE DEFENSE DIVISION AS
AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

**WHETHER PREJUDICE IS PRESUMED WHEN THE
PERFORMANCE OF A DEFENSE COUNSEL IS
ADVERSELY AFFECTED BY AN ACTUAL CONFLICT
OF INTEREST CREATED BY THE COUNSEL'S
CONCERN OVER HIS PROFESSIONAL REPUTATION.**



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**INTEREST OF THE UNITED STATES NAVY-
MARINE CORPS APPELLATE DEFENSE DIVISION**

The United States Navy-Marine Corps Appellate Defense Division (Division) represents Navy and Marine Corps personnel during appellate review of court-martial convictions. The decision of the Court of Appeals for the Armed Forces in this case is binding on all courts-martial tried in the Navy and Marine Corps. As a result, this Court's affirmance or reversal of the lower court's decision will directly impact the ability of Navy and Marine Corps

servicemembers – the Division's current and future clients – to receive conflict-free representation at court-martial.¹

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part, that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

STATEMENT

Petitioner, Private First Class (PFC) Jacques Saintauade, U.S. Army, was represented by several trial defense counsel during his court-martial. The two counsel central to this case were Captain (CPT) Michael Clarke, U.S. Army, and a civilian, Mr. Jacob Dickenson. CPT Clarke believed Mr. Dickenson was ineffective and even attempted to get Mr. Dickenson barred from practicing before courts-martial. Although he spelled out his concerns in a multi-page memorandum to his supervisors, CPT Clarke never told Petitioner—his client—those concerns about Mr. Dickenson's ineffectiveness. It is this conflict of interest that Petitioner argues makes his representation ineffective under the Sixth Amendment.

¹ As a government agency, the Division has not filed a motion for leave to file this brief under Rule 37(4).

ARGUMENT

The Court should take this case to clarify when conflicts of interest are analyzed under the *Cuyler v. Sullivan* standard and when they are analyzed under the *Strickland v. Washington* standard.

As the lower court itself acknowledged, appellate courts have applied different approaches to the question of whether a conflict of interest should be viewed as inherently prejudicial when it does not involve multiple representation.² Moreover, the lower court itself has applied both standards to conflicts of interest not involving multiple representation.³

The Court in *Cuyler v. Sullivan* found that a defendant that shows a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief.⁴ This a departure from the general rule requiring a showing of prejudice to obtain relief for claims of ineffective assistance of counsel.⁵ The conflict in *Sullivan* involved concurrent multiple representation.⁶ But does the departure from the requirement to show prejudice

² *United States v. Santaude*, 61 M.J. 175, 180 (C.A.A.F. 2005) (comparing *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) (applying an inherent prejudice standard to a conflict arising outside a multiple representation situation) with *Beets v. Collins*, 65 F.3d 1258, 1265-66 (5th Cir. 1995) (applying the *Strickland* standard to a conflict arising outside the multiple representation situation)).

³ Compare *United States Santaude*, 61 M.J. 175, 180 (C.A.A.F. 2005) with *United States v. Cain*, 59 M.J. 285, 295 (C.A.A.F. 2004) (applying *Sullivan* to a conflict outside the multiple representation situation).

⁴ *Sullivan*, 446 U.S. 335, 349-50 (1980).

⁵ *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).

⁶ *Sullivan*, 446 U.S. at 343.

extend to conflict of interest cases beyond concurrent multiple representation?

As the Court observed in *Mickens v. Taylor*, a successive representation case, the federal courts of appeal have applied *Sullivan* in a variety of circumstances beyond concurrent multiple representation.⁷ These other conflicts of interest included counsel's personal and financial interests, including book deals, romantic entanglements with the prosecutor, and attempts to obtain employment with a prosecutor's office.⁸ After reviewing the broad application of *Sullivan*, the Court suggested that *Sullivan* did not have such an expansive reach.⁹ The Court noted that, "[n]ot all attorney conflicts present comparable difficulties [as concurrent multiple representation cases]."¹⁰ Nonetheless, the Court resolved *Mickens* without reaching the question of whether *Sullivan* applied in a successive representation case.¹¹ Specifically, the Court left it "an open question."¹²

The Court should grant the writ of certiorari to clarify the scope of *Sullivan* and whether it applies to nonconcurrent multiple representation conflict of interest cases.

CPT Clarke violated his duty of loyalty to Petitioner.

The duty of loyalty to his client is perhaps the most basic of counsel's duties.¹³ This is one reason that

⁷ 535 U.S. 162, 174 (2002).

⁸ *Id.* (citing *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980); *Summerlin v. Stewart*, 267 F.3d 926, 935-41 (9th Cir. 2001); *Garcia v. Bunnell*, 33 F.3d 1193, 1194-95 (9th Cir. 1994)).

⁹ *Mickens*, 535 U.S. at 174.

¹⁰ *Id.*

¹¹ *Id.* at 176.

¹² *Id.*

¹³ *Strickland*, 466 U.S. at 692.

"[c]onflict-of-interest claims thus differ in kind from standard ineffective assistance of counsel claims."¹⁴ Here CPT Clarke had such serious concerns about Mr. Dickenson that he attempted to have him removed from practice before courts-martial.¹⁵ But CPT Clarke never told Petitioner of his concerns. Accordingly, Petitioner was denied, by his own counsel, the opportunity to address the situation. Petitioner never had the chance to replace Mr. Dickenson or otherwise make an informed decision as how best to proceed. CPT Clarke breached his duty of loyalty to Petitioner because he was concerned for his own reputation.¹⁶ The reasoning of *Holloway v. Arkansas* concerning the difficulty in determining prejudice, although in reference to multiple representations, applies equally here:

In a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . [I]t would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.¹⁷

¹⁴ *Bonin v. California*, 494 U.S. 1039, 1045 (1990) (denial of certiorari) (Marshall, J., dissenting).

¹⁵ *Saintaude*, 61 M.J. at 178.

¹⁶ *Id.* ("I believe further participation in this case could jeopardize . . . my good standing to practice law.").

¹⁷ 435 U.S. 475, 490-91 (1978).

Conflicts of interest not involving concurrent multiple representation can affect all government-appointed defense counsel.

Conflicts of interest that do not involve multiple representation situations can arise for a number of reasons. A public defender could be assigned to represent a terrorist or serial murderer during the time when he or she was running for public office. Government-appointed counsel can have conflicts with other detailed or privately-retained counsel, as in Petitioner's case.

Because of conflicts of interest not involving multiple representation can arise regularly in such a wide variety of contexts, the Court should clarify what standard should be applied by reviewing courts. Petitioner's situation is especially likely to be repeated in a military setting where defendants have both a statutory right to be represented by military counsel and the right to hire civilian defense counsel of their own choosing.¹⁸ But this issue is not uniquely military because such conflicts can arise in any jurisdiction. Accordingly, *amicus* requests this Court grant the petition for a writ of certiorari so the Court can clarify the proper standard reviewing courts should apply in non-concurrent multiple representation conflict of interest cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

¹⁸ Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827 (2000).

Respectfully submitted,

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